Supreme Court, U.S.
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No. 01-91 JUL 12 2001

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In The

Supreme Court of the United States

RAY DAYTON DOVE, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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48 pp

QUESTION PRESENTED FOR REVIEW

Did the District Court violate the Petitioner's Due Process rights by sentencing him based upon unreliable and speculative evidence relating to the value and quantity of black bear galls sold in violation of the Lacey Act?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties hereto.

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Ray Dayton Dove, Jr., respectfully petitions this Court for a Writ of Certiorari to review the order of the United States Court of Appeals for the Fourth Circuit filed on April 13, 2001, affirming the District Court's value placed upon black bear gallbladders. In addition to the value utilized for sentencing, Mr. Dove seeks review of the quantity of gallbladders calculated for relevant conduct purposes.

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Fourth Circuit (Williams Traxler and Jackson, JJ) was filed on April 13, 2001; the opinion is reprinted in the Appendix A on pages 1-13. The Fourth Circuit reversed the District Court's sentence because it incorrectly included 118 gallbladders which were legally sold by Mr. Dove. However, the opinion affirms the value placed upon these galls by the Court and the remaining quantity of gallbladders which were challenged by the Petitioner.

The United States District Court for the Western District of Virginia entered the judgment in this criminal case on March 7, 2000. That order is reprinted in the Appendix on pages 14-27.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 13, 2001, App. 1. This petition is filed within 90 days after the order of April 13, 2001. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. §1254(1).

TEXT OF CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT V- Grand jury indictment for capital crimes; double jeopardy; self incrimination; due process of law; just compensation for property.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury, except from cases arising in the land or naval forces or in the militia, when an act of service in time of war or public danger; or shall a person be subject for the same offense to be twice put in jeopardy of life or limb; or shall be compelled in any criminal case to be witness against himself nor be deprived of life, liberty, or property, without due process of law; or shall private property be taken for private use without just compensation.

The applicable provision of Amendment V is as follows:

> No person shall be ... deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

a. Statement of Facts

Ray Dayton Dove, Jr., was charged in a three count Indictment in the Western District of Virginia on March 11, 1999 for selling black bear gallbladders to an undercover agent in violation of the Lacey Act, 16 U.S.C. §3372(a)(2)(A). Mr. Dove subsequently pled guilty to a one count Information on August 25, 1999, for the identical conduct set forth in Court II of the Indictment.

Mr. Dove has been a merchant of animal parts, including organs and furs since the late 1980's. His business, Dove's Fur, is located in Petersburg, West Virginia and continues to operate as a legal entity in that State. Indeed, it was legal and customary to sale black bear gallbladders in West Virginia during the pertinent time frame herein. The District Court recognized his exemplary record as a hard-working, law abiding citizen which is now tainted by the sale of galls in the neighboring State of Virginia. After being contacted several times by an undercover agent, Mr. Dove agreed to sale Agent S.A. Stump galls. Although the Indictment correctly included galls actually sold in Virginia, the Information related to the Agent's delivery of funds in West Virginia and the subsequent shipment from West Virginia. Incidentally, it is legal to transport and store galls in Virginia, legally purchased elsewhere.

The Fourth Circuit correctly recognized that 118 galls purchased by Stump in West Virginia and transported to Virginia could not be used for relevant conduct purposes; however, the 14 galls forming the basis of the Information and categorically negated by the Appellate Court's ruling continue to be counted as relevant conduct.

In addition to challenging the inclusion of the 14 galls sold in West Virginia and shipped to Virginia, as relevant conduct, Mr. Dove also challenges the quantity attributed to him through Bonnie Sue Baldwin, the wife of his customer, Danny Baldwin. After excluding the 118 galls incorrectly counted by the District Court, Mr. Dove will remain responsible for 121 galls based primarily upon the court's acceptance of the Agent's hearsay summary of Ms. Baldwin's purported statements. This summary is inconsistent with the Probation Officer's independent assessment of the facts, and the statements of Mr. Dove and Danny Baldwin.

The Probation Officer found the reliable evidence to support a total of 50 galls sold to the Baldwins and 25 to Agent Stump. App. 33. This does not include the 118 galls

set aside by the Appellate Court. Nevertheless, the Court accepted Ms. Baldwin's figures as well as the price for which Ms. Baldwin sold gallbladders. The prices received by Petitioner were ignored by the Court. The District Court recognized the speculative nature of the calculations, (App. 30) but accepted Ms. Baldwin's value of $280 for each gall bladder. Other evidence supported a much lower value. Mr. Dove sold 25 galls to Agent Stump including the 14 in dispute at an inflated price of $2,900; this calculates to $116 per gall. Danny Baldwin corroborated Dove's value of $25-$60, depending upon the quality. This same price was also consistent with a published report in Outdoor Life magazine assessing a value of $45-$50 per gall. App. 28.

Mr. Dove also challenges the additional galls from the Baldwin transactions because some of this evidence was included in Petitioner's disclosure pursuant to an April 2. 1999 cooperation agreement. Subsequent to Petitioner's proffer and the plea agreement with respect to the Information, Petitioner was charged with and pled guilty to a one count Indictment for the illegal sale of gallbladders to Danny and Bonnie Baldwin. The relevant conduct calculation included the quantity disclosed by Mr. Dove and corroborated by Mr. Baldwin as well as additional quantities purportedly disclosed by Ms. Baldwin.

b. Statement of Jurisdiction of the Lower Court

The United States District Court for the Western District of Virginia had subject matter jurisdiction of the underlying criminal case pursuant to 16 U.S.C. §§3372(a)(2)(A) and 3373(d)(1). The jurisdiction of the Appellate Court was invoked pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3742(a).

ARGUMENT

The Petitioner was deprived of Due Process of Law because he was punished for information revealed during his proffer of evidence and his sentence was based upon unreliable, contradictory values and quantities of black bear gallbladders.

The fundamental principle of our justice system is that no person shall be deprived of life, liberty or property without Due Process of Law. Mr. Dove's basic privilege under the 5th Amendment was drastically altered because his punishment included incorrect, unreliable hearsay. The Court's factual determinations under the United States Sentencing Guidelines were clearly erroneous because they did not meet the indicia of reliability standard. See e.g. *U.S. v. Nelson,* 137 F.3d 094 (9th Cir. 1998), and *U.S. v. Rothberg,* 954 F.2d 217 (4th Cir. 1992) and *U.S. v. Sampson,* 140 F.3d 585 (4th Cir. 1998), suggesting that quantities are uncertain, a district court should accept the lesser quantities. The determinations in the instant case were simply not plausible in light of the reliable evidence.

Furthermore, the Fourth Circuit Decision, by implication, requires the exclusion of the 14 gallbladders sold to Agent Stump and transported to Virginia. The Fourth Circuit clarified that only conduct illegal in Virginia could be counted for sentencing purposes. It is undisputed that Mr. Dove received payment in West Virginia and he shipped the 14 galls from West Virginia. The Fourth Circuit provided an excellent analysis of the requirements for violating Virginia law and the corresponding Federal Statute. However, this analysis was not applied to the 14 galls sold to Agent Stump.

In that regard, the Court explained that penal statutes must be strictly construed and that a phone conversation between an individual in Virginia and West Virginia concerning the sale of bear parts legally taken in West Virginia did not violate Virginia law or 16 U.S.C.

§3372(a)(2)(A). The sale is not complete until the money is supplied and goods delivered. App. A. Page 7-10. The Court stated: "Dove's sale of galls in West Virginia did not violate Virginia law because it occurred outside the boundaries of Virginia jurisdiction." Id. at 7.

The same reasoning applies to the phone calls leading up to the delivery of funds to West Virginia and the transfer of galls from West Virginia. The actual transaction occurred in West Virginia. Mr. Dove's due process rights were violated by including this quantity in relevant conduct and by his conviction for this innocent conduct. In *U.S. v. Powell,* 124 F.3d 655, 665 (5th Cir. 1997), the court reiterated that in order to constitute relevant conduct, the acts must be criminal. Title 16 U.S.C. §3372 makes it unlawful

> to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce, . . . wildlife taken, possessed, transported or sold in violation of any law. . .

The galls sold by Petitioner were legally taken and purchased in West Virginia, a state where it was legal to do so. See e.g. West Virginia Code §20-2-4. The Virginia statute relied upon as a predicate for the Federal Statute was §29.1-553; this statute makes it unlawful to offer to sale, sale, offer to purchase or purchase any wild animal in Virginia. The Lacey Act is not triggered unless a person purchases or sales wildlife that was already taken, transported or possessed in violation of state law. *U.S. v. Carpenter,* 933 F.2d 748 (9th Cir. 1991). Those circumstances do not exist with respect to the 14 galls. More importantly, Virginia Code §8.2-106 and 8.2-401(2) define a sale as the passing of title which occurs at the time and place where the seller completes his performance by delivering the goods. In this case, the delivery occurred in West Virginia after receiving payment in that State and when Dove delivered the goods to the United Parcel Service.

This conclusion is absolutely required and is inescapable based upon the reasoning applied to exclude the 118 galls. The case has been remanded for resentencing, but the failure to exclude the additional 14 galls resulted in a misapplication of law. The legal determination is subject to *de novo* review. Due Process requirements necessitate reversal of the sentence and conviction and exclusion of this evidence from relevant conduct.

The Petitioner was also deprived of Due Process by the Court's arbitrary and speculative determination of fair market value. U.S.S.G. §2Q2.1 and §2F1.1 require a determination of fair market value to ascertain the guideline sentencing range for Lacey Act violations. The initial flaw in this case surrounds the District Court's misapplication of the term, fair market value. This concept refers to the price in which a willing buyer and willing seller, under no compulsion to buy or sell, agree to be reasonable. Indeed, this concept of value is universally accepted and applied. Application Note 4 to §2Q2.1 provides further guidance for this determination. Where the fair market retail price is difficult to ascertain, the Court may make a reasonable estimate based upon any reliable information. The problem in this case is that all reliable information was ignored by the Court. The best estimate of fair market value is always the actual selling price. In this case, there are actual transactions confirming the fair market value, but Mr. Dove was punished based upon speculation as to what others may receive for galls. Our judicial system surely has not progressed to the point that a person is punished for what he did not do. The average price of the galls sold to Agent Stump and the Baldwins was $88. This figure is reliable and consistent because it reflects actual sales, not theoretical transactions.

Rather than accepting these figures, the Court created its own fair market value. Mr. Dove should be held accountable for the amount he received, not amounts paid to other individuals. The applicable guideline sections do not

require or even contemplate reference to other transactions when actual sales are available to the Court. Nevertheless, the Court assessed $280 per gall. The District Court even acknowledged the speculative nature of its conclusion. The Court explained:

> There is no firm evidence, as the court sees it, in trying to reach some sort of determination on price and on amount of galls. There is a great deal of projection on both sides, perhaps speculation on both sides, but in a situation like there, there is an immutable principle that still prevails and that is that you look at what evidence you have and make a conclusion. App. 30.

Fortunately, caselaw addresses these situations. In *U. S. v. Williams,* 50 F.3d 863 (10th Cir. 1995) the Court relied upon actual transactions and cautioned that fair market value should remain what a willing buyer would pay a willing seller at that particular time and place. The transactions involving Agent Stump may be overstated since an agent, attempting to create criminal violations would likely pay more than fair market value. Thus, the most reliable fair market value would be the Baldwin transactions at $60 per gall. An average would also be acceptable. The Fourth Circuit ignored this reasoning and simply stated that this factual determination was within the Court's discretion. The evidence addressed at sentencing unequivocally demonstrates that the conclusion was clearly erroneous.

Moreover, the Court's reliance upon Sue Baldwin to determine the number of galls was clearly erroneous and inconsistent with the plethora of evidence confirming that only 75 galls, rather than 146 galls were sold by Mr. Dove. It is interesting that Ms. Baldwin and others originally supported the Probation Officer's conclusions, but at sentencing the Government agent claimed Ms. Baldwin

calculated 121 galls as originating from Mr. Dove. This figure and the 25 sold to Agent Stump amount to 146 galls. These figures were also derived from information supplied by Mr. Dove as part of his plea agreement, a clear violation of U.S.S.G. §1B1.8 and *U.S. v. Blackburn*, 205 F.3d 1335 (4th Cir. 2000), unpublished.

The calculation made by the Probation Officer, 75 galls (notwithstanding the 118 set aside by the Fourth Circuit), is certainly accurate and the most reliable information available to the Court. The only modification would be the 14 galls referred to earlier which actually involved a legal sale. Thus, the total galls attributable to Mr. Dove under §2F1.1 is 61 at a fair market value of $60 resulting in a total value of $3660. Under §2Q2.1 and §2F1.1 Mr. Dove's adjusted offense level, after acceptance of responsibility should be 7 with a guideline range of 0-6 months, rather than 11 and 8-14 months as calculated by the Court. At most, the offense level should be 8, based upon 61 galls at the average value of $88 and a total price of $5,368.

In either event, the Court speculated as to the number and value of galls, a result which is unacceptable under well-settled precedent. The District Court was also incorrect in utilizing the additional galls purportedly provided unto the agent by Ms. Baldwin because Mr. Dove provided incriminating evidence as a part of his cooperation agreement. After being asked numerous, specific questions concerning the Baldwins and faithfully providing thorough responses through a proffer, Mr. Dove was indicted on a new count involving the Baldwins. At a minimum, a Kastigar hearing was necessary to ascertain whether the indictment was based upon Mr. Dove's proffer or entirely independent evidence. See e.g. *U.S. v. Kastigar*, 402 U.S. 971, 91 S.Ct. 1668 (1972). Accordingly the conviction is flawed and the relevant conduct calculation violates Petitioner's constitutional rights.

CONCLUSION

In sum, the Petitioner was deprived of his right to Due Process of Law in several respects. He was convicted of an offense which was completely legal. More specifically, money was paid in West Virginia and the shipment originated in West Virginia. This issue is subject to *de novo* review because it involves purely a question of law. The remaining due process violations involve factual determinations which were clearly erroneous and subjected Mr. Dove to excessive punishment. Accordingly, Petitioner submits that this Petition for Writ of Certiorari should be granted and that this case remanded to the Fourth Circuit with directions to revise the relevant conduct calculations

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 00-4248

RAY DAYTON DOVE, JR.,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Virginia, at Charlottesville.
James H. Michael, Jr., Senior District Judge.
(CR-99-69, CR-99-83)

Argued: January 25, 2001
Decided: April 13, 2001
Entered: April 13, 2001

Before WILLIAMS and TRAXLER, Circuit Judges, and Raymond A. JACKSON, United States District Judge for the Eastern District of Virginia, sitting by designation.

Vacated and remanded with instructions by published opinion. Judge Williams wrote the opinion, in which Judge Traxler and Judge Jackson joined.

COUNSEL

ARGUED: Frederick Theodore Heblich, Jr., Charlottesville, Virginia, for Appellant. Jean Barrett Hudson, Assistant United States Attorney, Charlottesville, Virginia, for Appellee. **ON BRIEF:** Robert P. Crouch, Jr., United States Attorney, Charlottesville, Virginia, for Appellee.

OPINION

WILLIAMS, Circuit Judge:

Ray Dayton Dove, Jr., pleaded guilty to an information charging that he violated the Lacey Act, 16 U.S.C.A. §§ 3372(a)(2)(A), 3373(d)(1) (West 2000), in November and December 1998, by selling or offering to sell black bear gall bladders ("galls") in Virginia in violation of Va. Code Ann. § 29.1-553 (Michie 1997 & Supp. 2000), and placing them in interstate commerce. He also pleaded guilty to an indictment charging that he conspired to sell or offer galls and black bear paws for sale knowing that these items were transported in interstate commerce in violation of the Lacey Act, 18 U.S.C. §§ 3372(a)(2)(A) & 3373(d)(1)(b), and Va. Code Ann. §§ 29.1-553 (Michie Supp. 2000). Dove argues on appeal that the district court erred at sentencing in including as relevant conduct his sale of 118 galls to an undercover agent (the 118 galls sale) because that sale occurred in West Virginia, where the sale of galls is legal. Dove also challenges the district court's estimation of the value of the galls. We vacate Dove's sentence and remand for re-sentencing because we conclude that neither Dove's sale of the 118 galls nor his offer to sell the 118 galls was illegal under Virginia law and thus was not properly included as relevant conduct under the Guidelines.

I.

Dove operated a store in West Virginia where he was licensed to deal in furs, hides, deer antlers, and bears. Between 1996 and 1998, he sold bear galls to Bonnie and Danny Baldwin, both Virginia residents. Dove delivered the galls to the Baldwins in Virginia. The Baldwins resold the galls to Asian customers from northern Virginia, Washington, D.C., and Baltimore. In October 1998, Agent W.K. Stump of the Virginia Department of Game and Inland Fisheries arranged to buy bear galls from Dove, representing that he, too, intended to sell the galls to Asian customers. Dove drove to Abingdon, Virginia, and delivered eleven galls to Stump. In November and December 1998, Dove shipped a total of fourteen galls to Stump in Virginia. In January 1999, a final sale of 118 galls was arranged through a series of telephone calls between Stump in Virginia and Dove in West Virginia. Dove agreed to weigh, inspect, and put bear tags on each gall, and they agreed on a price and a date and time when Stump would come to get them. On January 18, 1999, Stump, accompanied by several agents, drove to Doves store in West Virginia and purchased the galls.

After his guilty pleas, Dove objected unsuccessfully to the inclusion of the 118 galls sale as relevant conduct and disputed the probation officers estimation of the value of the galls. The district court included the 118 galls sale as relevant conduct, and, after awarding a two-level downward departure for acceptance of responsibility as well as applying a five-level enhancement for the market value of the galls sold, the district court found a total offense level of 12 under the United States Sentencing Guidelines, which, in conjunction with Dove's lack of prior criminal history, yielded a guideline imprisonment range of 10 to 16 months and a supervised release range of two to three years. Without the inclusion of the 118 galls sale as relevant conduct, Dove would have received a four-level, rather than a five-level,

enhancement for the value of the galls (using the district court's valuation method), and his offense level would have been 11, yielding an imprisonment range of 8 to 14 months. The district court sentenced Dove to 5 months of imprisonment and 36 months of supervised release, with five months of his supervised release term to be served as home detention.[1] Dove contends on appeal that the 118 galls sale was not criminal conduct because it occurred in West Virginia where the sale of bear galls is lawful. The Government argues that the 118 galls sale "in its entirety" violated Virginia law, and that the 118 galls were correctly included as relevant conduct. The critical issues on appeal are whether Dove violated Virginia law and, separately the Lacey Act in connection with the 118 galls sale and the propriety of the district court's method of valuing the galls sold.

II.

We review the district court's factual findings at sentencing, including the determination of relevant conduct, for clear error. See United States v. Fletcher, 74 F.3d 49, 55 (4th Cir. 1996). Review of pure questions of law relative to a guideline determination when the relevant facts are undisputed is de novo. United States v. Ruhe, 191 F.3d 376, 390 (4th Cir. 1999).

A.

The district court denied Doves objection to the inclusion of the 118 galls sale as relevant conduct for sentencing purposes. Its reasoning was explained in its previous order denying Doves motion to dismiss Count

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[1] The district court was authorized by United States Sentencing Commission, Guidelines Manual, § 5C1.1(d)(2) (Nov. 1998), to provide that up to one-half of Dove's term of imprisonment be served via a term of supervised release that includes home confinement.

Three of the original indictment,[2] which charged that Dove violated Virginia law and the Lacey Act in connection with the 118 galls sale. See United States v. Dove, 70 F. Supp.2d 634, 636-39 (W.D. Va. 1999).

As a threshold matter, the Government argues that "non-benign" conduct may properly be considered as relevant conduct. However, if conduct which is not illegal may be relevant conduct because it is "not benign," this approach would involve sentencing courts in the impossibly subjective task of determining the relative "benignness" of various legally permissible acts, and "would allow individuals to be punished by having their guideline range increased for activity which is not prohibited by law but merely morally distasteful or viewed as simply wrong by the sentencing court." United States v. Peterson, 101 F.3d 375, 385 (5th Cir. 1996); see also United States v. Wilson, 980 F.2d 259, 262 (4th Cir. 1992) (noting that the task of a district court in determining the amount of loss is to determine the amount "that is attributable to [the defendant's] criminal conduct"); United States v. Dickler, 64 F.3d 818, 830-31 (3rd Cir. 1995) (agreeing that "relevant conduct" under § 1B1.3 must be criminal conduct). We thus conclude that relevant conduct under the Guidelines must be criminal conduct.

In its order denying Doves motion to dismiss Count Three of the original indictment, the district court held that Count Three properly charged (1) a sale of wildlife in violation of Va. Code Ann. § 29.1-553,[3] and (2) transportation of the illegally sold wildlife in interstate commerce. Dove, 70 F. Supp.2d at 638-39. Although it was

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[2] Count Three was dismissed on the Governments motion.

[3] Va. Code Ann. § 29.1-553 provides in relevant part: "[a]ny person who offers for sale, sells, offers to purchase, or purchases any wild bird or wild animal, or any part thereof . . . shall be guilty of a Class 1 misdemeanor," and provides further that the crime is a felony if the value of the animals or parts exceeds $200. Va. Code Ann.§ 29.1-553 (Michie 1997 & Supp. 2000).

actually Stump who transported the 118 galls into Virginia, the district court found that Dove placed the galls in interstate commerce by selling them to Stump because Dove believed that Stump would take them to Virginia and resell them. Id. at 639.

The Lacey Act is a federal statute that imposes federal penalties for certain violations of state law, and provides in part that it is unlawful for any person "to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce . . . any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State." 16 U.S.C.A. § 3372(a)(2)(A) (West 2000). Thus, Dove's conduct did not violate the Lacey Act unless the wildlife he sold had been "taken, possessed, transported or sold in violation" of Virginia law. Id. The only Virginia provision which the Government argues as a basis for finding Dove's conduct illegal is § 29.1-553, and that provision, we conclude, prohibits the sale of the bear galls at issue in this case, but not their transportation or possession.[4]

In its ruling, the district court relied upon our decision in United States v. Gay-Lord, 799 F.2d 124, 126 (4th Cir. 1986), in which we held that a defendant who sold illegally taken rockfish to federal agents "knew that the rockfish would be transported in interstate commerce and

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[4] Other provisions of Virginia law could be read to permit the possession and transportation of the galls at issue in this case. See Va. Code Ann. § 29.1-553 (Michie 1997 & Supp. 2000) (not prohibiting the transportation or possession of animal parts); Va. Code Ann. § 29.1-521 (Michie 1997 & Supp. 2000) (prohibiting transportation or possession of wild animals except as otherwise permitted by law); Va. Code Ann. § 29.1-542 (Michie 1997 & Supp. 2000) (permitting importation of wild animals legally taken in another state); Va. Code Ann. § 29.1-541 (Michie 1997 & Supp. 2000) (permitting storage, hence possession, of wild animals where sale would be illegal, in the home or a licensed storage location). We have no occasion to interpret the meaning of these provisions, because they were not argued to us by the parties in this case. See Williams v. Chater, 97 F.3d 702, 706 (5th Cir. 1996) (noting that ordinarily, issues not raised in briefs are waived).

took the steps that began their travel to interstate markets," and thus violated the Lacey Act. Id. at 126. Gay-Lord, however, is distinguishable. In that case, it was uncontroverted that the rockfish sold in interstate commerce had first been taken in violation of state law. Id. at 125. Here, no argument is made that the 118 galls were taken, possessed, or transported in violation of the law of any state; thus, unless Virginia law prohibited the sale in West Virginia of the 118 galls, Dove's act of placing them into interstate commerce did not violate the Lacey Act. The standard which must be met to satisfy the "interstate commerce" aspect of the Lacey Act is not a demanding one, as Gay-Lord illustrates. But Virginia's principles of criminal jurisdiction, as the following discussion illustrates, are not coextensive with the federal definition of interstate commerce, and the Lacey Act is not violated unless the animal parts which move in interstate commerce have been "taken, possessed, transported or sold" in violation of state law.[5]

While the district court interpreted the telephone conversations between Dove and Stump and the subsequent activity of the two men as constituting a "sale" in Virginia, we are not persuaded that a sale took place either in Virginia or in violation of the law of Virginia. A "sale" is defined under Virginia law as "the passing of title from the seller to the buyer for a price." Va. Code Ann.§ 8.2-106 (Michie 1991

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[5] The Government notes that the Ninth Circuit, in United States v. Sylvester, 605 F.2d 474, 475 (9th Cir. 1979), held that an actual "sale" in violation of state law is not necessary to sustain a Lacey Act violation, reasoning instead that offer, acceptance and partial payment in a jurisdiction where sale is prohibited constitute "sufficient sales activity" to support a Lacey Act conviction. Id. at 475. To the extent that Sylvester holds that a legal sale following interstate delivery may form the predicate for a Lacey Act violation, we disagree, as the text of the Lacey Act requires not merely a sale but a sale "in violation of any law . . . of any State." 16 U.S.C.A. § 3372(a) (West 2000). We note, however, that on its own terms Sylvester is distinguishable, as no partial payment was made and no other sufficient sales activity occurred in Virginia in this case.

& Supp. 1999) (cross reference omitted). Here, title passed in West Virginia, and no "sale," as Virginia defines that term in Va. Code Ann. § 8.2-106, occurred in Virginia.

Nor can the Government rely on the "results theory" of jurisdiction to establish that Dove's sale in West Virginia violated Virginia law.

The "results theory" holds that physical presence in a state is not necessary to create criminal jurisdiction over an act "if the crime is the immediate result of the accused's act; under such circumstances, the accused may be tried in the state's courts even though actually absent at the time the act was committed." Moreno v. Baskerville, 452 S.E.2d 653, 655 (Va. 1995) (internal quotation marks omitted). However, this exception to the general rule that "every crime to be punished in Virginia must be committed in Virginia," Farewell v. Commonwealth, 189 S.E. 321, 323 (Va. 1937), is not without its limits. In Moreno v. Baskerville, the defendant, Moreno, sold marijuana in Arizona to Moore, whom he knew would distribute the marijuana to his associates for sale in Virginia. Moreno, 452 S.E.2d at 654. The Virginia Supreme Court held Moreno's resulting conviction for distribution of marijuana invalid on the grounds that, despite Moreno's knowledge that the drugs would be resold in Virginia, their resale was not the "immediate result" of the distribution of drugs in Arizona. Id. at 655. Instead, Moore's distribution of the marijuana to his associates in Virginia intervened, so that the situation was "entirely unlike a case in which a shot fired across a state line `immediately' results in harm, thus enabling the forum state to exercise extraterritorial jurisdiction over the assailant." Id. Here, the Government does not argue that Virginia law prohibits the possession of the galls in question.[6] Thus, the bringing about of an illegal result depended on Stump's resale of the galls in Virginia. Stump's

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[6] See Va. Code Ann. §§ 29.1-541, 29.1-542 (Michie 1997 & Supp. 2000) (permitting the importation of legally taken wildlife and the home storage of wildlife whose sale is prohibited by law).

resale of the galls, which never occurred because Stump was an undercover agent, is precisely the sort of intervening act which, under Virginia jurisdictional principles as elaborated in Moreno, negates the immediacy of the resulting harm and renders the "results theory" of jurisdiction inapplicable. Thus, Dove's sale of the galls in West Virginia did not violate Virginia law because it occurred outside the boundaries of Virginia jurisdiction.[7]

B.

The district court also found that Dove violated Va. Code Ann. § 29.1-553 by making an offer of sale in Virginia during his communications with Stump over the telephone. The Government contends that Doves offer occurred "over the telephone in Virginia." (Appellee's Br. at 9.) We initially note that in cases involving communications by mail or telephone, Virginia courts have often applied the "results theory," suggesting that Virginia courts do not deem telephone offers to constitute actual conduct in Virginia but instead view such offers as acts outside Virginia intended to cause an immediate unlawful result in Virginia. See Keselica v. Commonwealth, 480 S.E.2d 756, 759-60 (Va. App. 1997); see also Travelers Health Ass'n v. Commonwealth, 51 S.E.2d

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[7] Keselica v. Commonwealth, 480 S.E.2d 756, 759-60 (Va. App. 1997), is not to the contrary. In Keselica, a conviction for embezzlement was upheld because although the act of embezzlement occurred in Maryland, the defendant used the mails and telephone to solicit funds from Virginia residents "for the sole purpose of diverting the funds to his own use." Id. at 759. In Keselica, the embezzlement at issue was illegal in both states.

Further, the use of the mails and telephone to defraud Virginia residents is clearly the kind of act contemplated by the results theory. It is performed in another jurisdiction but, in a direct and unmediated fashion, inflicts harm in Virginia. A financial fraud scheme conducted by mail and telephone is clearly distinguishable from a telephone conversation followed by a legal sale in another jurisdiction, where possession of the item sold is not illegal in Virginia.

263, 268 (Va. 1949) (concluding that company which offered securities to Virginia residents through the mails in violation of Virginia regulations could be prosecuted based on results theory); cf. O'Briant v. Daniel Constr. Co., 305 S.E.2d 241, 243 (S.C. 1983) (stating, "[w]here acceptance is given by telephone, the place of contracting is where the acceptor speaks his acceptance").

In any event, the resolution of this question has no bearing in this case because Dove's telephone offer to sell the galls to Stump, in response to Stump's offer to buy, was, at minimum, plainly an act outside Virginia intended to produce an immediate result in Virginia; it was to a statute prohibiting an "offer" what a rifle shot fired at a Virginia resident from another state is to a statute prohibiting assault with a firearm.

While we believe that Virginia could assert jurisdiction, based on the results theory, to prosecute Dove for his telephone offer to sell galls, that is not the end of the inquiry. Dove urges that Va. Code Ann. § 29.1-553's prohibition on "offering for sale" any animal part must be read in conjunction with the offense of"sale" itself; in other words, Dove argues that "offer to sell" is essentially a codification of a crime analogous to attempt, and the "sale" which is "offered" must be illegal in order for the offer to violate § 29.1-553. Cf. Parham v. Commonwealth, 347 S.E.2d 172, 173-74 (Va. App. 1986) (noting that legal impossibility is a defense to a charge of attempt). Because Dove offered to sell galls in West Virginia, and the contemplated sale did not violate the law of Virginia, Dove argues that his offer to sell, whether or not within Virginia criminal jurisdiction, did not violate the statute.

We believe that some ambiguity exists as to whether§ 29.1-553's prohibition on "offers to sell" encompasses offers to engage in legal sales. In light of the nature of Virginia's interest in protecting the integrity of its wildlife, it would seem anomalous to read "offer to sell" as stating a freestanding offense which is capable of existing when the

offered transaction does not violate Virginia law. For example, the Government's construction of the "offer to sell" language would apply § 29.1-553 to prohibit two residents of states in which a sale is legal from contracting in Virginia to sell animal parts, even where the transaction will be performed entirely outside of Virginia and will not touch Virginia in any way. We believe the better reading of § 29.1-553 is that "offers to sell" are illegal only when the sale that is offered would be illegal; we believe the most reasonable construction of the "offer to sell" language is that it functions to facilitate prosecution of attempts to sell animal parts in violation of Virginia law even where the sale is never carried out. Our conclusion is buttressed by Virginia's rule of lenity, which provides that while a criminal defendant is not entitled to an unreasonably restrictive construction of a statute, penal statutes "must be strictly construed and any ambiguity or reasonable doubt as to [their] meaning must be resolved in [the defendant's] favor." Ansell v. Commonwealth, 250 S.E.2d 760, 761 (Va. 1979).

Here, the district court found that the January 14, 1999 conversation between Dove and Stump was the time of agreement on the specific terms of the January 18 sale, including price, quantity and other key terms. United States v. Dove, 70 F. Supp.2d at 636. In his January 14 telephone conversation, Dove indicated that he would not be able to deliver the galls that were to be sold on January 18 and urged Agent Stump to call him to discuss the matter further at a later date. (J.A. at 102.) Only when Stump indicated that he was willing to come to West Virginia to pick up the galls did Dove's language indicate a definite acceptance of Stump's offer. We conclude that Dove did not make an offer to engage in an illegal sale in Virginia, and thus, his telephone offer did not violate Va. Code Ann. § 29.1-553.

III.

Dove next challenges the district court's determination as to the market value of the galls he sold. The guideline applicable to a Lacey Act violation, United States Sentencing Commission, Guidelines Manual, § 2Q2.1 (Nov. 1998), provides for an enhancement from the table in USSG § 2F1.1 if the market value of the wildlife exceeds $2000. Application Note 4 states that, where "information is readily available, `market value' under subsection (b)(3)(A) shall be based on the fair-market retail price. Where the fair-market retail price is difficult to ascertain, the court may make a reasonable estimate using any reliable information . . . ." U.S.S.G. 2Q2.1, comment (n.4).

The district courts calculation of the market value of the bear galls is a factual question that is reviewed for clear error. United States v. Eyoum, 84 F.3d 1004, 1008 (7th Cir. 1996). Dove argues that the market value should be the price for galls in West Virginia where such sales are legal. Dove also argues that the district court erred in applying Eyoum, which held that the retail value for pancake tortoises rather than the lower "smugglers price" should be used. See id. at 1007. Dove contends that his lower price was the retail price because he was operating in a legal market. Dove believed, however, that both the Baldwins and Stump intended to resell the galls. Therefore, they were not buying at retail. The district court was aware that the price paid by the ultimate consumers was higher, but it had no firm evidence of what the retail price might be. The district court used the highest price for which it had reliable evidence-- the Baldwins average retail price of $280 per gall. The district court did not clearly err n doing so.

IV.

In conclusion, we find that the district court erred in including as "relevant conduct" Dove's sale of 118 galls, because relevant conduct under the Guidelines must be criminal conduct, and neither Dove's January 18 sale nor his telephone acceptance of Stump's offer to buy violated Virginia law or the Lacey Act. We find, however, that the district court's method for calculating the market value of the galls was proper. We thus vacate Dove's sentence and remand with instructions to the district court to recalculate Dove's sentence without including as relevant conduct the January 18 sale of 118 galls.

VACATED AND REMANDED WITH INSTRUCTIONS

Sheet 1

UNITED STATES DISTRICT COURT
Western District of Virginia

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Entered March 7, 2000

UNITED STATES OF AMERICA

v.

RAY DAYTON DOVE, JR.

CASE NUMBER:
3:99CR00069-001
3:99CR00083-001

Fred Heblich
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) One of the Indictment and Information

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty.

Title & Section	**Nature of Offense**
16:3373(d)(1)	Knowingly Sell or Offer to Sell Wildlife, in excess of $350.00, to Wit: Black Bear Gall Bladders.

Date Offense Concluded	**Count Number(s)**
02/18/00	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☒ Count(s) **2&3** of the indictment are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Defendant's So. Sec. No.:
233-84-1670

February 18, 2000
Date of Imposition of Judgment

Defendant's Date of Birth:
11/04/51

\s\ **James H. Michael**
Signature of Judicial Officer

Defendant's USM No.:
07632-084

Honorable James H. Michael, Senior United States District Judge
Name and Title of Judicial Officer

Defendant's Residence Address:
110 South Main Street
Petersburg, WV 26847

March 7, 2000
Date

Defendant's Mailing Address
110 South Main Street
Petersburg, WV 26847

DEFENDANT: Ray Dayton Dove, Jr.

CASE NUMBER: 3:99CR00069-001
3:99CR00083-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **5** month(s).

This term consist of 5 months as to Count One of the Indictment and 5 months as to Count One of the Information to be served concurrently.

☐ The court makes the following recommendation to the Bureau of Prisons

☐ The defendant is remanded to the custody of the United States Marshal for this district:

☒ The defendant shall surrender to the United States Marshal for this district:

- ☐ at _____ on _____
- ☒ as notified by the United States Marshal

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before _____ on _____
- ☐ as notified by the United States Marshal
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy United States Marshal

DEFENDANT: Ray Dayton Dove, Jr.

CASE NUMBER: 3:99CR00069-001
3:99CR00083-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term on **36** month(s).

This term consists of 36 mos. as to Count One of the Indictment and 36 mos. as to Count One of the Information to be served concurrently; as a special condition of supervised release the defendant shall serve 5 months home detention with electronic monitoring and shall pay the costs of the monitoring service at the rate of $4.35 per day to be served concurrently.

MANDATORY CONDITIONS OF SUPERVISION

1) The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

2) The defendant shall not commit another federal, state or local crime.

3) The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

4) The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☒ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

5) If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the special conditions on the Special Conditions of Supervision Page.

STANDARD CONDITIONS OF RELEASE

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification reqirement;

DEFENDANT: Ray Dayton Dove, Jr.

CASE NUMBER: 3:99CR00069-001
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ADDITIONAL SUPERVISED RELEASE TERMS

The defendant shall submit to warrantless search and seizure of person and property as directed by the probation officer.

The defendant shall not possess a firearm or destructive device and shall reside in a residence free of firearms and destructive devices.

The defendant shall pay any special assessment imposed by this judgment.

DEFENDANT: Ray Dayton Dove, Jr.

CASE NUMBER: 3:99CR00069-001
3:99CR00083-001

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	**$200.00**	**$3,000.00**	

☐ If applicable, restitution amount ordered pursuant to plea agreement _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of **$3,000.00**

The defendant shall pay interest on any fine more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C § 3612(g).

☐ The court has determined that the defendant does not have to ability to pay interest and it is ordered that:

☐ The interest requirement is waived.
☐ The requirement is modified as follows:

DEFENDANT: Ray Dayton Dove, Jr.

CASE NUMBER: 3:99CR00069-001
3:99CR00083-001

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A. ☐ in full immediately; or
B. ☐ _____ immediately, balance due in accordance with C, D, or E; or
C. ☐ not later than; or
D. ☒ in installments to commence **30** days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court establish a payment schedule if appropriate; or
E. ☐ in _____ installments of _____ to commence ____ days after the date of this judgment.

Any installment schedule is subject to adjustment by the court at any time during the period of imprisonment or supervision, and the defendant shall notify the probation officer and the U.S. Attorney of any change in the defendant's economic circumstances that may affect the defendant's ability to pay.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

All criminal monetary penalties shall be made payable to the Clerk, U.S. District Court, P.O. Box 1234, Roanoke, Virginia 24006, for disbursement.

Special instructions regarding the payment of criminal monetary penalties:

The fine consists of $1500.00 as to each count in the Indictment and the Information for a total of $3000.00. The Special Assessment consists of $100.00 per count for a total of $200.00. The fine shall be paid in monthly installments of $55.00 beginning on February 14, 2000. The installment schedule is subject to adjustment by the court.

☐ Joint and Several

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons; Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

DEFENDANT: Ray Dayton Dove, Jr.
CASE NUMBER: 3:99CR00069-001
3:99CR00083-001

STATEMENT OF REASONS

☐ The court adopts the factual findings and guideline application in the presentence report.

OR

☒ The Court adopts the factual finding and guideline application in the presentence report except (see attachment, if necessary): **see attached.**

Guideline Range Determined by the Court:

Total Offense Level:	**12**
Criminal History Category:	**I**
Imprisonment Range:	**10 to 16 months**
Supervised Release Range:	**2 to 3 years**
Fine Range:	**$3,000.00 to $30,000.00**

☐ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: _____

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(a)(1)(B)(ii)

☐ For offenses committed on or after September 13, 1994, but before April 23, 1996 that require a total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payments of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered for the following reason(s):

☒ The sentence is within the guideline range, that does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☐ The sentence is within the guideline range, that exceeds 24 months, and the sentence is imposed for the following reasons:

OR

☐ The sentence departs from the guideline range:

☐ upon motion from the government, as a result of defendant's substantial assistance.

☐ for the following specific reasons:

* * *

and World Report. I find myself relying on Outdoor Life, Sportsman Authority since 1898. This is a survey, exactly of bear gall bladders, what the prices for them are in states where they're legal, in states where they're illegal and they say the going price for a black bear gall bladder in West Virginia is 45 to $50. I know this runs counter to the

* * *

* * *

Q. If you know, what then were the prices that Mr. Dove charged when he resold the galls? What did he get for them?

A. Well, in the purchases that Agent Stump made, there was quite a variety in the prices that he charged to Agent Stump even though, in fact, they were said to be by the ounce. At least one of the deals was sold to Agent Stump for $17 per ounce. During that particular one, that was a fairly large purchase, so he may have gotten some - - in fact, Agent Stump did ask for a wholesale discount because he was buying some. To the Baldwins, he would, from their comments, he sold to them anywhere from 60 to $125, with the most frequently, $100 per gall.

* * *

THE WITNESS: Yes, sir. $100 was the most common figure at which he sold them to the Baldwins.

* * *

Q. Did Danny Baldwin at any time say something slightly different from what Bonnie said?

A. Yes, ma'am.

* * *

* * *

There is no firm evidence, as the Court sees it, in trying to reach some sort of determination on price and on amount of galls. There is a great deal of projection on both sides, perhaps speculation on both sides, but in a situation like there, there is an immutable principle that still prevails and that is that you look at what evidence you have and make a conclusion.

* * *